

**Before the
Commission on Common Ownership Communities**

In the Matter of

Charles and Ivy Pereira
12730 Veirs Mill Road, #104
Rockville, MD 20853,

Complainants,

v.

Park Terrace Condominium
Margaret Bruce, President
12700 Veirs Mill Road
Rockville, MD 20853,

Respondent.

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Case No. 335-O
March 3, 1997

DECISION AND ORDER

The above-entitled case, having come before the Commission on Common Ownership Communities for Montgomery County, Maryland, pursuant to Sections 10B-5(i), 10B-9(a), 10B-10, 10B-11(e), 10B-12, and 10B-13 of the Montgomery County Code, 1994, as amended, and the Commission, having considered the testimony and evidence of record, finds, determines and orders, as follows:

Background

On March 27, 1996, Charles Pereira, husband of Ivy Pereira an owner of Unit 104, 12700 Veirs Mill Road, Rockville, MD, filed a complaint with the Office of Common Ownership Communities. Inasmuch as the matter was not resolved through mediation, this dispute was presented to the Commission on Common Ownership Communities for action pursuant to Section 10B-11(e) on August 7, 1996. This complaint was very broad in the violations alleged and the Commission declined to accept jurisdiction but indicated that if the complainant was able to narrow the statement of alleged violations to issues within the jurisdiction of the Commission a new complaint would be considered. On September 3, 1996, the Complainant, joined by his wife, an owner of a unit in the community (Complainants), filed a revised complaint.

The Commission voted to accept jurisdiction of the revised complaint on November 6, 1996. Park Terrace Condominium moved that the Commission reconsider their jurisdiction in this matter and the Commission considered that motion on December 4, 1996. The Commission voted to affirm acceptance of jurisdiction as to the allegations of violations of the Maryland Condominium Act sections 11-109.2(c), 11-110(b)(1), 11-109(a), 11-135 and Park Terrace

Condominium by-laws Article V, Section 6. The matter was scheduled for a public hearing on January 15, 1997.

The allegations of violations in the revised Complaint for which the Commission accepted jurisdiction are:

1. The Council of Unit Owners has not delegated authority to the Board of Directors to adopt the annual budget, thus the adoption of the annual budget by the Board is in violation of the Maryland Condominium Act section 11-109.2 which states that "[t]he budget shall be adopted at an open meeting of the council of unit owners or any other body to which the council of unit owners delegates responsibilities for preparing and adopting the budget."

2. The Board of Directors is spending funds designated as "Reserves" for current expenses in violation of Maryland Condominium Act section 11-110(b)(1) which states that "[f]unds for the payment of current common expenses and for the creation of reserves for the payment of future common expenses shall be obtained by assessments against the unit owners...."

3. The Board of Directors has acted outside its authority in spending Reserve Funds in excess of \$1000 without approval by a majority of the unit owners in violation of Article V, Section 6 of the Park Terrace Condominium by-laws which states, "[w]henver in the judgment of the Board of Directors the Common Elements shall require additions, alterations or improvements costing in excess of \$1000 in the aggregate during any fiscal year, and the making of such additions, alterations or improvements shall have been approved by a majority of the Owners...."

4. The Council of Unit Owners has not delegated authority to the Board of Directors to assess and expend Reserves and consequently, the assessment and expenditure of Reserve Funds by the Board without the approval of the unit owners is a violation of Maryland Condominium Act section 11-109(a) which states that "[t]he affairs of the condominium shall be governed by a council of unit owners..."

5. The Board, in not providing every unit owner with a copy of the monthly financial statement, is in violation of the requirements of Maryland Condominium Act section 11-135 mandating that the Council of Unit Owners provide purchasers with certain information.

On behalf of the Park Terrace Condominium Board of Directors, Lawrence Gaffigan, of Gaffigan Partners, the management agent for the community responded to the allegations set forth above, as follows:

1. The Park Terrace Condominium By-laws at Article III, Section 2(a) requires that the Board of Directors prepare an annual budget. The proposed budget is submitted to unit owners at least 30 days before scheduled adoption. The agenda for the Board meeting at which the budget is to be adopted is posted 72 hours in advance of the meeting.

2. The Park Terrace Condominium By-laws at Article V(d) instructs the Board of Directors to build up and maintain reserves for working capital, operations, contingencies, and common expenses.

3. Article V, Section 6 of the Park Terrace Condominium By-laws relates to "additions, alterations and improvements" and work of that nature has not been done but instead the work the Board has paid for has been repairs and replacements on the Common Elements.

4. The Park Terrace Condominium By-laws provides for governance, including financial management, by the Board of Directors on behalf of the unit owners.

5. On behalf of the Park Terrace Board of Directors, the management company has prepared and provides to purchasers in the community a Resale Package which includes all of the required documents. Financial reports and other documents relating to the operation of the community are available for inspection during business hours by appointment at the office of the management company.

During the hearing, Respondents alleged that Complainants had not exhausted the administrative remedies available to them under the Rules and Regulations of Park Terrace Condominium.

At the close of the hearing the Respondent requested that the panel waive the provisions of Montgomery County Code section 10B-9(e) so that certain offers for maintenance, repair or replacement work which would be paid for out of reserves could be accepted. The panel determined and the community was so notified that, to the extent that section 10B-9(e) may apply, the provisions were waived as to those projects that the Board of Directors determined were of immediate importance and the Office on Common Ownership Communities was to be notified what contracts were awarded pending issuance of the decision.

Findings of Fact

Based on the testimony and evidence of record, the Panel makes the following findings of fact:

1. The Park Terrace was constructed in 1974 as a condominium community. There are three separate buildings of three or four stories located on five and a quarter acres with a total of 110 dwelling units.
2. Mr. and Mrs. Pereira have lived at Park Terrace for more than two years in a unit of which Mrs. Pereira is an owner. Mr. Pereira testified that they received condominium documents when the unit was purchased.
3. The Park Terrace Condominium By-laws at Article V, Section 1(b) state:

Preparation and Approval of Budget. Each year on or before August 1st, the Board of Directors shall adopt a budget for the Condominium containing an estimate of the total amount which it considers necessary to pay the cost of maintenance, management, operation, repair and replacement of the Common Elements and those parts of the units as to which it is the responsibility of the Board of Directors to maintain, repair and replace, and the cost of wages, materials, insurance premiums, services, supplies and other expenses that may be declared to be Common Expenses by the Horizontal Property Act, these Bylaws or a resolution of the Council of Owners, and which will be required during the ensuing fiscal year for the administration, operation, maintenance and repair of the Property and the rendering to the Owners of all related services. Such budget shall also include such reasonable amounts as the Board of Directors considers necessary to provide working capital for the Condominium, a general operating reserve, and reserves for contingencies and replacements. The Board of Directors shall send to each Owner a copy of the budget, in a reasonably itemized form which sets forth the amount of the Common Expenses payable by each owner, on or before August 15th preceding the fiscal year to which the budget applies. The said budget shall constitute the basis for determining each Owner's contribution for the Common Expenses of the Condominium.

4. The Park Terrace Condominium fiscal year is from September 1 to August 31 according to Article V, Section 1(a) of the Bylaws.

5. The Maryland Condominium Act at section 11-109.2(a) has required since 1983 that the budget be prepared and submitted to unit owners at least 30 days before its adoption.

6. Mr. Gaffigan describes the budget adoption process for Park Terrace Condominium, in a May 8, 1996 letter to Sharon Wilder revised August 6, 1996:

The management agent is required by contract to draft a proposed budget 120 days prior to the new fiscal year. The Board reviews and amends this proposed budget and submits to each homeowner for their review and comments 30 days prior to adoption. Once adopted at a Board meeting, the budget and payment coupons are forwarded to each owner.

7. In relation to the events involved in the adoption of the budget for the 1995-96 fiscal year, the record includes, at pp. 521-26 of Commission Exhibit 1, the minutes of the June 29, 1995 meeting of the Board of Directors which indicate, at p. 521, that the proposed budget would be sent to co-owners in mid-July for their review prior to the July meeting. At pp. 128-9 and 834-5 of Commission Exhibit 1, there is an undated memo to Park Terrace Co-Owners from the Board of Directors which appears to be a transmittal of the 1995-96 proposed budget and 20-year restoration plan and an invitation to the July 27, 1995 meeting of the Board of Directors. The memo indicates that the Board will discuss the budget at the July 27 meeting and adopt it in August. The minutes of the July 27 meeting of the Board of Directors, at pp. 828-833 of Commission Exhibit 1, indicate (p. 832) that the 1995-96 budget was approved at that meeting. A memorandum dated August 1, 1995 to the Park Terrace Co-Owners from the Board of Directors transmits the 1995-96 budget which it says was approved at the July meeting of the Board of Directors. (Commission Exhibit 1 at p. 844)

8. The process of adopting the 1996-97 fiscal year budget is reflected in the record by a letter from the Board of Directors to the Park Terrace Co-Owners dated June 11, 1996 transmitting the proposed budget for the next year and indicating that the next meeting of the Board of Directors would be held on July 11, 1996 and inviting comments on the budget. (Commission Exhibit 1 at p. 789.) The minutes of the July 11, 1996 meeting of

the Board of Directors indicate that the proposed budget for fiscal year 1997 was adopted as presented. (Commission Exhibit 1 at p. 854.)

9. The Park Terrace Condominium Bylaws provide at Article V, Section 1(d), Reserves.:

The Board of Directors shall build up and maintain reasonable reserves for working capital, operations, contingencies and replacements. Extraordinary expenditures not originally included in the annual budget which may become necessary during the year shall be charged first against such reserves....

10. The Park Terrace Condominium Bylaws provide at Article V, Section 5, Maintenance and Repair.:

(a) By the Board of Directors. The Board of Directors shall be responsible for the maintenance, repair and replacement of the following, the cost of which shall be charged to all Owners as a Common Expense:...

This language is followed by a list of the parts of the Condominium which are the responsibility of the Board of Directors. Subsection (b) of this section sets forth the responsibilities of the individual unit owner for maintenance and repair of their unit.

Subsection (c) Manner of Repair and Replacement., provides:

All repairs and replacements shall be substantially similar to the original construction and installation and shall be of first-class quality. The method of approving payment vouchers for all repairs and replacements shall be determined by the Board of Directors.

11. At Article V, Section 6, the Bylaws provide:

Additions, Alterations or Improvements by Board of Directors. Whenever in the judgment of the Board of Directors the Common Elements shall require additions, alterations or improvements costing in excess of \$1,000 in the aggregate during any fiscal year, and the making of such additions, alterations or improvements shall have been approved by a majority of the Owners, the Board of Directors

shall proceed with such additions, alterations or improvements and shall assess all Owners for the cost thereof as a Common Expense. Any additions, alterations or improvements costing in the aggregate \$1,000 or less during any fiscal year may be made by the Board of Directors without approval of the Owners and the cost thereof shall constitute part of the Common Expenses....

12. Mr. Pereira testified that he interpreted Article V, Section 5 as language which allocated the responsibility for repair and replacement between the Board of Directors and the unit owners. Complainants offered no testimony differentiating between work which had been done which might be considered additions, alterations or improvements rather than repairs or replacements.

13. Included in the record (Commission Exhibit 1 at pp. 188-205) is a "Twenty-Year Capital Expenditure Projection", compiled by Priority Engineering Services and labeled 04-04-1994, for Park Terrace Condominium. This document includes (at p. 195) a list of 39 "components". Both the "Preface" (p. 191) and "Methodology" (p. 192) sections discuss the accumulation and use of reserves for "repairs" and "replacements". There was no testimony offered indicating that the component elements included in this study were not currently existing in the community.

14. The Maryland Condominium Act at section 11-109(b) says that the bylaws may authorize or provide for the delegation of any power of the council of unit owners to a board of directors, officers, managing agent, or other person for the purpose of carrying out the responsibilities of the council of unit owners.

15. The Dispute Settlement Mechanism set forth at Chapter 2 of the Rules and Regulations for the Park Terrace Condominium provide that "[a]ny resident or co-owner may file a complaint alleging a violation of these regulations."

Conclusions of Law

The Commission concludes, after full and fair consideration of the evidence of record, based on a preponderance of the evidence that:

1. The authority to adopt the budget is delegated to the Board of Directors by virtue of the Park Terrace

Condominium Bylaws Article V, Section 1(b), in accordance with the Maryland Condominium Act section 11-109(b).

2. The Park Terrace Board of Directors and Mr. Gaffigan, their managing agent, appear to understand the requirement of the Maryland Condominium Act to provide a copy of the budget that the Board of Directors proposes to the unit owners 30 days before adopting that budget, and in 1996 complied with the law. In 1995, however, the copy of the budget provided to unit owners was not provided 30 days prior to adoption. There is no appropriate remedy for this lapse at this time.

3. Section 11-110(b)(1) authorizes condominium communities to establish assessments based on current expenses and estimated future maintenance and replacement requirements. The language of the statute does not restrict a community from spending funds assessed as reserves from being spent for current maintenance and replacement requirements. The Park Terrace Condominium Bylaws authorize expenditure of reserve funds. No evidence was presented to indicate that reserve funds are being expended in a manner or for purposes which violate the statute and Park Terrace Condominium Bylaws.

4. The Park Terrace Bylaws require in Article V, Section 1(b) that the Board of Directors include in the annual budget the funds considered to be necessary for, among other things, repair and replacement of the common elements. In Section 5 of the same Article, the Bylaws establish that the Board is responsible for maintenance, repair and replacement of the common elements and enumerated other shared or structural elements of the community. No evidence was offered that the Board had authorized or expended funds for work that was other than the kind of repairs or replacements described in Section 5(c) of this Article. Thus, the situation in which a requirement for approval of the owners in Article V, Section 6 is not evident in this record and no violation of that section is established.

5. Under the Park Terrace Condominium Bylaws the authority to assess and expend reserves is explicitly delegated to the Board of Directors in accordance with Maryland Condominium Act section 11-109(b).

6. The requirement for providing information in section 11-135 of the Maryland Condominium Act is a responsibility placed on the seller of a condominium to the purchaser and is not an on-going requirement on the Council of Unit Owners and by delegation on the Board of Directors. The requirement for unit owners to have

access to condominium records on a continuing basis is set forth in section 11-116 of the Maryland Condominium Act which says that they must be available within the county in which the condominium is located during normal business hours after reasonable notice. Documents in the record indicate that the Park Terrace records are so available in the office of the management agent.

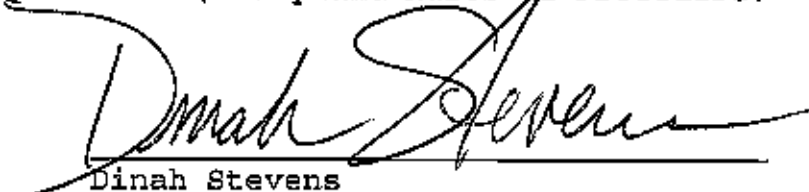
7. The Dispute Settlement provision of the regulations by the terms set forth therein appear to apply only to disputes under the regulations. The issues in this Complaint do not relate to the regulations.

Decision

In view of the foregoing, based on the evidence of record, for the reasons set forth above, the Commission finds that the Plaintiff has not proven that the Defendant has committed any violation of law or the Bylaws of the community and the case is dismissed with prejudice.

The foregoing was concurred in by panel members Auvil, Jacobsen and Stevens.

Any party aggrieved by the action of the Commission may file an administrative appeal to the Circuit Court of Montgomery County, Maryland, within thirty (30) days from the date of this Decision, pursuant to Chapter 1100, Subtitle B, Maryland Rules of Procedure.


Dinah Stevens
Panel Chairwoman
Commission on Common Ownership
Communities